No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATTHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

KELLY SHACKELFORD
HIRAM SASSER
JUSTIN BUTTERFIELD
JEREMY DYS
LIBERTY INSTITUTE
2001 W. Plano Pkwy #1600
Plano, TX 75075
(972) 941-4444

BRITTNEY LANE
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071
(213) 430-6000

BRIAN D. BOYLE
(*Counsel of Record*)
bboyle@omm.com
GREGORY F. JACOB
MATTHEW J. SHEEHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 4

A. This Case Is Exceptionally Important Because HHS's Bifurcated Exemption-Accommodation Scheme Directly Contradicts Congress's Command for Universal Protection of Religious Liberty in RFRA 4

B. The Decision Below Is Wrong In Upholding a Purported Accommodation That Imposes a Substantial Burden On Sincere Religious Beliefs in Violation of RFRA 12

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Bazemore v. United States,
138 F.3d 947 (11th Cir. 1998) 21

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014) ..... passim

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 14

Employment Div., Dept. of Human Res. of Ore. v. Smith,
494 U.S. 872 (1990) 20

Hernandez v. Comm'r,
490 U.S. 680 (1989) 20

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
132 S. Ct. 694 (2012) 10, 14

Larson v. Valente,
456 U.S. 228 (1982) 14

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell, Case Nos. 13-1540, 14-6026, 14-6028,
2015 WL 4232096 (10th Cir. July 14, 2015) ..... passim

Pinkerton v. United States,
328 U.S. 640 (1946) 21

Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,
393 U.S. 440 (1969) 20

Salinas v. United States,
522 U.S. 52 (1997) 21

United States v. Bennett,
75 F.3d 40 (1st Cir. 1996) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Daniels,
370 F.3d 689 (7th Cir. 2004) 21

United States v. Luciano-Mosquera,
63 F.3d 1142 (1st Cir. 1995) 21

Utility Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 7, 10, 11

Wright v. United States,
182 F.3d 458 (6th Cir. 1999) 21

Zubik v. Sebelius,
983 F. Supp. 2d 576 (W.D. Penn.
2013) 10

STATUTES

26 U.S.C. § 4980H 11

26 U.S.C. § 6033 5

42 U.S.C. § 18011 11

42 U.S.C. § 2000bb 5, 6

42 U.S.C. § 2000bb-1 ..... 6, 7, 12

42 U.S.C. § 2000bb-2 6

42 U.S.C. § 2000bb-3 ..... 6, 10, 12

42 U.S.C. § 2000e-1 14

42 U.S.C. § 300gg-13 7

OTHER AUTHORITIES

1 H. Davis, Moral and Pastoral
Theology 341 (1935) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, originally issued on February *available at*: http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventiveservices-guidance-6-28-2013.pdf. 23

Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom & the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995) 6

REGULATIONS

26 C.F.R. § 1.6033-2 5

45 C.F.R. § 147.131 ..... 5, 8, 16

76 Fed. Reg. 46621 (Aug. 2, 2011) 8, 13

78 Fed. Reg. 39870 (July 2, 2013) ..... passim

80 Fed. Reg. 41318 ..... passim

BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

Amici are four religious, non-profit retirement communities and two religious, non-profit colleges associated with the Christian and Missionary Alliance ("CMA") denomination. All amici follow the doctrines and teachings of the CMA. This includes the belief that all life is equally sacred and blessed of God and must be preserved and nurtured. Because of their belief in the sacredness of all human life, the amici's sincere religious convictions preclude them from providing for, facilitating, authorizing, or designating, directly or indirectly, the provision of drugs, devices, procedures, or counseling that could harm or kill a fertilized egg. Amici thus have a

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both petitioners and respondents were notified of the amici's intention to file this brief at least 10 days prior to its due date in accordance with Supreme Court Rule 37.2(a). Letters from the petitioners and the respondents consenting to all amici briefs are on file with the Clerk's office.

strong interest in preserving their right under the Religious Freedom Restoration Act of 1993 to choose to offer health insurance coverage that comports with their sincere religious beliefs.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> *Now, what ... kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?*
> *— Justice Kennedy during oral argument in Burwell v. Hobby Lobby Stores*[2]

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But it also means much more. It allows individuals to "preserv[e] their own dignity and ... striv[e] for a self-definition shaped by their religious precepts." *Id.* And it protects the individual's "right to express [her] beliefs and to establish [her] religious (or non-religious) self-definition in the political, civic, and economic life of our larger community." *Id.*

A believer's ability to act in accordance with his religious beliefs is inestimably important. In religion, as in all aspects of life, actions often speak louder than words. Recognizing that different people may assign different significance to different acts, the government and the courts have studiously

---

[2] Transcript of Oral Argument at 56, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

avoided judging the importance or reasonableness of the actions that an individual believes will bear on his eternal fate.

Reiterating and reinforcing this tradition, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). In RFRA, Congress made a clear policy determination about the importance of religious liberty—including the right to act in accordance with one's faith. Congress declared that, as a default rule, religious beliefs must be respected, even if that means religious believers have to be exempted from otherwise generally applicable laws. It made this default rule applicable across the U.S. Code, including to subsequent enactments like the Affordable Care Act ("ACA"). And Congress afforded protection to all religious believers without drawing presumptive distinctions between them.

Despite this, when implementing the "preventative care" provision of the ACA, HHS decided that only *some* religious believers were entitled to the full protections that RFRA provides. Knowing that several religious entities—both churches and other religious organizations—objected to having any involvement in providing contraceptives, HHS nonetheless determined that it needed to completely exempt only churches from the contraceptive mandate. In HHS's view, non-churches which shared *identical* religious beliefs did not deserve the same protection. Instead, they merited only an accommodation which required them to authorize another entity to use their healthcare plans to provide contraceptive coverage in their stead—an action that the religious objectors consider morally tantamount to providing the objected-to contraceptives themselves.

In drawing arbitrary distinctions between classes of religious believers, HHS contradicted an express statutory protection, exceeded its delegated authority, and substantially burdened the sincere religious beliefs of several objectors, including the petitioners in this case. HHS has given the non-church religious objectors two choices: violate their sincere religious beliefs or pay a hefty fine. This Court already found that this choice violates RFRA, and it should not hesitate to do so again.

REASONS FOR GRANTING THE PETITION

A. This Case Is Exceptionally Important Because HHS's Bifurcated Exemption-Accommodation Scheme Directly Contradicts Congress's Command for Universal Protection of Religious Liberty in RFRA

An important separation-of-powers issue permeates petitioners' and other religious organizations' objections to HHS's decision to require contraceptives as a form of "preventative care" under the ACA. Knowing full well that several religious employers objected to providing some or all of the contraceptives it had required, HHS nonetheless exempted churches—and *only* churches—from its contraceptive mandate. It required all other religious organizations to either be complicit in fulfilling the regulatory mandate or drop their insurance plans and pay substantial fines. By offering some religious objectors greater protection than others, HHS improperly took upon itself the status of super-legislature, deciding just how far the government should go in protecting religious liberty. But neither the Constitution, nor Congress, gave HHS that power over this

important question. In RFRA, Congress in fact *obligated* HHS to afford the *same protection* to the sincere beliefs of all religious objectors regardless of whether they qualify as churches under the Internal Revenue Code.[3] Indeed, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Given RFRA's undiscriminating protection of religious liberty and its applicability to all statutes, including subsequent enactments such as the ACA, HHS lacked authority to deny sincere religious objectors the complete exemption from the contraceptive mandate that it deemed necessary to protect churches which share the exact same beliefs.

When it enacted RFRA, Congress made a sweeping statement regarding the importance of religious liberty. It recognized "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). It affirmed its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(3). And it concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

---

[3] HHS delineated the churches exempt from the contraceptive mandate using a tax exemption found in the Internal Revenue Code. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i),(iii) to define exempt churches); *see also* 26 C.F.R. § 1.6033-2(g)(i)–(ii).

Congress's pronouncement was not merely rhetorical. It gave these sweeping statements equally sweeping effect. In RFRA, Congress provided that the government—including any "branch, department, agency, instrumentality, and official" of the United States, *id.* § 2000bb-2(1)—cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," *id.* § 2000bb-1(a). And it made this rule applicable to every federal law and every implementation of federal law whether it pre-dated RFRA's passage or was enacted thereafter. *Id.* § 2000bb-3(a). Congress in essence created a "super-statute"—a statutory command that "cut[s] across all other federal statutes (now and future, unless specifically exempted) and modif[ies] their reach." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom & the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995).

Congress offered only two narrow means for overriding the sweeping protection it afforded to religious exercise in RFRA. Congress can choose to lift RFRA's rigorous protections by "explicitly" exempting a particular enactment from its requirements. 42 U.S.C. § 2000bb-3(b). Or the government can justify imposing a substantial burden on religious exercise in a particular case by demonstrating that its actions constitute the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000bb-1(b). If neither of these exceptions is satisfied, then the government cannot impose a burden on an individual's religious exercise regardless of whether the law is otherwise generally applicable. *Id.* § 2000bb-1.

When it enacted the ACA, Congress did not exclude RFRA's application. That means, at minimum, two things. *First*, when it enacted the ACA, Congress made a determination that the ACA's goals were not so compelling that religious objections should be required to yield to them—for if they were so compelling, Congress would have explicitly exempted the ACA from RFRA's reach. *Second*, every requirement that the ACA imposes—including the requirement to provide "preventative care"—is subject to an express *statutory* exemption available to any person who can show that the requirement places a substantial burden on their sincere religious beliefs. Only if the government shows that the burden imposed on that particular believer is the least restrictive means of furthering a compelling interest can the exemption be overcome. In this respect, the government must isolate a compelling interest *apart from the need to effectuate the burden-imposing law itself*; the latter cannot serve as that interest in light of Congress's decision to subject the ACA to religious exceptions.

These two background rules supplied by RFRA form the statutory bounds that should have guided, and restrained, HHS when it set out to define what forms of "preventative care" individual and group health plans were required to provide. *See* 42 U.S.C. § 300gg-13(a)(4). After all, HHS's authority, even if broad, always remains subservient to clear statutory text. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444–45 (2014). Instead of respecting the statutory commands, however, HHS proceeded to issue regulations that purport to categorically narrow the scope of RFRA's protections in the context of the ACA's "preventative care" requirement by excluding

from those protections any religious entity that does not qualify as a church or an integrated auxiliary of a church under the Internal Revenue Code.

Shortly after HHS issued its initial proposed list of preventative services that individual and group health plans would be required to provide, several religiously affiliated organizations objected to the requirement that their plans supply all FDA-approved contraceptive methods. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The religious objectors pointed out that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *Id.* Many religious employers had never covered these benefits, and they objected to being forced to do so in contravention of their religious beliefs. *Id.*

HHS responded by "balanc[ing] the extension of any coverage of contraceptive services ... to as many women as possible" against "the unique relationship between certain religious employers and their employees in certain religious positions." *Id.* In making its own determination about how to appropriately strike this balance, HHS decided to offer a religious exemption to some religious objectors but not others. Churches and their integrated auxiliaries were excepted from the contraceptive mandate; all other religious objectors were not. 78 Fed. Reg. 39870, 39873–75 (July 2, 2013); *see also* 45 C.F.R. § 147.131. According to HHS, those other objectors would be sufficiently "accommodated" if they could permit someone else to use their insurance plans to provide the contraceptives that their religious objections did not allow them to provide themselves. Un-

surprisingly, the religious objectors did not find this "accommodation" satisfactory. *See* 78 Fed. Reg. at 39873–75.

In deciding to respect the concerns of some religious objectors but not others, HHS has attempted to re-strike a balance that Congress already struck when it enacted the ACA. Congress knew full well that by enacting the ACA without an exception from RFRA, it was leaving fully intact RFRA's requirements. Congress thus made a determination that the ACA's goals should not be pursued at the expense of *any person's* religious liberty. HHS could not comply with RFRA by drawing categorical distinctions between groups of religious objectors: "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

In enacting RFRA, Congress did not draw distinctions between religious believers that turned on the vagaries of their status under the Internal Revenue Code, and for good reason. Just as religious beliefs do not become any less sincere or deserving of protection when the believer decides to make a living using a business organized in the corporate form, *see Hobby Lobby*, 134 S. Ct. at 2768–72, religious beliefs do not become any less sincere or deserving of protection when the believers decide to pursue educational and charitable endeavors in accordance with their faith, *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–09 (2012). The "enigmatic" result of HHS's bifurcated

exemption-accommodation scheme is that individuals who "share identical[] religious beliefs" can adhere to those beliefs when the Internal Revenue Code has declared them a church, but not "when acting as the heads of the charitable and educational arms of [that same] Church." *See, e.g.*, *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 607 (W.D. Penn. 2013).

HHS's line-drawing thus contravenes the line that Congress—the *law-making* authority—decided was appropriate. Congress could have decided that the protections RFRA affords religious liberty should only apply to churches—but it did not. Congress could have decided that the "preventative care" requirement in the ACA was so important that no, or only some, religious objectors should be exempt from it—but it did not. Congress instead left RFRA fully applicable to the ACA. *See* 42 U.S.C. § 2000bb-3(a). HHS is bound to take action consistent with this legislative determination. It does not have the power to revise or reverse it.

Putting the case in a different context illustrates the point. Suppose Congress enacted a law that required any power plant that emitted pollutants to obtain a permit. And suppose further that Congress created a statutory exemption for power plants that emitted less than 100,000 tons of those pollutants per year. Could the agency decide to "'tailor' [the] legislation to [its] bureaucratic policy goals" by offering the statutory exception only to power plants that emitted less than 500 tons of pollutants per year? *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45. Certainly not. To do so would be to contradict the "unambiguously expressed intent of Congress" and thus to go "well beyond the 'bounds of [the agency's]

statutory authority.'" *See id.* at 2445 (citation omitted).

So too in the context of the ACA. No one would suppose that the agency could decide to limit the statutory exception for grandfathered health plans to exclude grandfathered plans that are less than ten years old. *See* 42 U.S.C. § 18011. And no one would suppose that the agency could decide to revise the statutory exception for small employers to exclude those that employ fewer than forty individuals rather than those who employ fewer than fifty. 26 U.S.C. § 4980H(c)(2)(A). There is no reason to treat the exemption for religious objectors in RFRA any differently. HHS cannot arbitrarily restrict the exemption for *all* religious objectors to tax-code-labeled churches any more than it can restrict the exception for all grandfathered plans to those that are more than ten years old or the exception for small employers to those that have fewer than forty employees.

HHS's actions in implementing the ACA demonstrate that it sees RFRA's command to protect religious exercise as a secondary consideration, subordinate to HHS's regulatory goal of distributing contraceptives. Indeed, as the facts of this case demonstrate, HHS sees RFRA's command as so subordinate to its regulatory goals that it is willing to demand compliance with the "accommodation" even if compliance does nothing more than force religious objectors to violate the tenets of their faith. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, Case Nos. 13-1540, 14-6026, 14-6028, 2015 WL 4232096, at *9–10 (10th Cir. July 14, 2015) (noting that Little Sisters of the Poor must comply with the accommodation even though its employees receive coverage through a self-insured church plan

and "the Departments concede they [presently] lack authority to compel church plan TPAs to provide contraceptive coverage"). Congress could not have been more clear in requiring the opposite. In RFRA, Congress expressly exempted individuals or entities from "rule[s] of general applicability" that "substantially burden" their "exercise of religion," 42 U.S.C. § 2000bb-1(a), and it made this exemption fully applicable to subsequent enactments such as the ACA, *id.* § 2000bb-3(a). Congress firmly decided that statutory requirements, including the ACA, *could and should* tolerate religious exceptions for *any* person whose sincere beliefs were substantially burdened. HHS had no authority to contravene or reevaluate that decision.

B. The Decision Below Is Wrong In Upholding a Purported Accommodation That Imposes a Substantial Burden On Sincere Religious Beliefs in Violation of RFRA

Contrary to RFRA's commands, it is evident from the very nature of HHS's bifurcated exemption-accommodation scheme that the agency intended to distinguish between religious objectors based on its own determinations about the import of the particular believer and the reasonableness of the particular belief.

1. HHS knew that many religious organizations objected to participating directly or indirectly in providing contraceptives. *See, e.g.*, 76 Fed. Reg. at 46623. Yet it automatically exempted only *some* religious objectors from the mandate: HHS effectively classified churches as more "religious" than other religious organizations based on their status under the

Internal Revenue Code. *See* 78 Fed. Reg. at 39873–74.

As HHS explained, it exempted churches because it believed that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874; *see also* 80 Fed. Reg. 41318, 41325 (July 14, 2015). And, when a commenter recently pointed out that some churches and integrated auxiliaries might not employ people of the same faith, HHS further justified its decision to afford churches special treatment by claiming that the exemption was consistent with churches' "special status under longstanding tradition in our society and under federal law." 80 Fed. Reg. at 41325.

HHS has cited no support for the proposition that a church is more likely than other religious organizations to share its religious beliefs with its employees. And, beyond the supposition that churches are inherently more religious than other institutions, there is no reason to suspect this is true. Quite to the contrary, past cases show that numerous other types of religious organizations, including schools and charitable organizations like the Little Sisters of the Poor, are just as likely as churches to hire individuals who share their religious beliefs. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 699–700; *see also Little Sisters of the Poor*, 2015 WL 4232096, at *10. Congress recognized as much when it exempted not only churches, but any "religious corporation, association, educational institution, or society" from the equal em-

ployment provisions of Title VII. *See* 42 U.S.C. § 2000e-1(a).

HHS's newly discovered justification for treating churches differently than other religious institutions fares no better. Contrary to HHS's assertion, with respect to protections for religious exercise, churches have *not* been singled out for a "special status under longstanding tradition in our society." 80 Fed. Reg. at 41325. Instead, this Court has held that all religious believers are entitled to the same protection, regardless of whether they pursue their faith in an established church or elsewhere. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246, 255 & n.23 (1982) (criticizing a statute that effectively drew distinctions between "well-established churches" and "churches which are new and lacking in a constituency" as "set[ting] up precisely the sort of official denominational preference that the Framers of the First Amendment forbade"); *see also Hobby Lobby*, 134 S. Ct. at 2767–68; *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993).

More to the point, HHS's argument that some religious believers should be treated differently than others under the ACA because of a "longstanding tradition in our society" has already been rejected by this Court. *See Hobby Lobby*, 134 S. Ct. at 2773–74. In *Hobby Lobby*, this Court was unpersuaded by HHS's argument that a line should be drawn between "churches and other nonprofit religious institutions," on one hand, and "for-profit corporations,"

on the other hand, based on a national "tradition."[4] *Id.* at 2773. HHS now puts forth essentially the same argument that failed before, only altering *where* it wants to draw the line: According to HHS, "longstanding tradition in our society" now supports a distinction between churches and other religious adherents rather than between non-profit and for-profit entities. 80 Fed. Reg. at 41325. This new-found "longstanding tradition" should be rejected for the same reasons this Court rejected the "tradition" in *Hobby Lobby*: Congress drew no such distinction in RFRA. *Hobby Lobby*, 134 S. Ct. at 2773–74. As has been repeatedly emphasized, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

2. HHS implicitly decided that offering what it deemed the more "religious" objectors a complete exemption from the contraceptive mandate was an appropriate way to avoid imposing a substantial burden on their beliefs. And as a result of the exemp-

---

[4] Interestingly, in *Hobby Lobby*, HHS touted the exemption for all religious organizations in Title VII as the best evidence of a national "tradition" of providing exemptions to accommodate religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2773. Yet in adopting the bifurcated exemption-accommodation scheme, HHS chose to ignore the scope of the traditional Title VII exemption that was crafted expressly for the employment context, and to instead apply one codified in the Internal Revenue Code, under the theory that the latter is better tailored to identify employers who are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874.

tion, those churches need not certify their religious beliefs, provide any notice to HHS or any other entity, or take any action that would result in the provision of contraceptives to their employees through their own healthcare plans. *See id.*; *see also* 45 C.F.R. § 147.131(a).

Although HHS does not dispute that other religious objectors, including the petitioners in this case, share sincere beliefs *identical* to those of the churches that HHS chose to exempt from the mandate, HHS has nonetheless determined that these other objectors are not deserving of identical protections. Instead, HHS offers these objectors a purported "accommodation" that continues to require them to "comply" with their obligation to provide contraceptives. 78 Fed. Reg. at 39879.

To satisfy HHS's accommodation, the religious objectors must either complete a self-certification form or provide notice to HHS of their religious objections to some or all of the contraceptives that the mandate would otherwise require them to provide. 80 Fed. Reg. at 41322–23. Whether religious objectors complete the self-certification form or provide HHS notice, the end result is the same: They become complicit in the mandate, and in most (if not all) cases their insurers, third-party administrators, or other plan contractors will use the objectors' healthcare plan to "provide coverage for contraceptive services without cost sharing to participants and beneficiaries." *Id.* at 41323; 78 Fed. Reg. at 39876.[5]

---

[5] Although HHS concedes that it currently may not force the third-party administrators for self-insured church plans to provide contraceptive coverage, *see Little Sisters of the Poor*, 2015 WL 4232096, at *9, it evidently believes that it will be

The religious objector's self-certification or HHS notification has two important consequences. *First*, for those that purchase group insurance and for most self-insured plans, the notice or self-certification shifts financial and some of the administrative responsibility for providing contraceptive coverage to either the objector's insurer or, if it is self-insured, to its third-party administrator. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. *Second*, in all cases, the notice or self-certification gives the insurer, third-party administrator, or other plan contractors the authority to use the "insurance coverage network" and the "coverage administration infrastructure" that the objector has established to provide the objected-to contraceptives. 80 Fed. Reg. at 41328–29; 78 Fed. Reg. at 39879–80. That is, rather than creating "two separate health insurance policies," 78 Fed. Reg. at 39876, the accommodation allows other entities to use the objector's own healthcare plan to provide the contraceptives. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. In effect, then, the accommodation scheme requires religious objectors to hand over their healthcare plans to other entities, knowing that those entities can and likely will use the plan to provide contraceptives in their stead.

This accommodation substantially burdens religious objectors' concededly sincere religious beliefs. Religious objectors like the petitioners adamantly believe that *any* facilitation of or complicity in the

---

able to convince or coerce *someone* to provide contraceptives through the religious objector's healthcare plan. Specifically, HHS believes that once a religious objector complies with the accommodation, HHS has the power to authorize *any* of the plan's third-party contractors to provide contraceptive coverage through the plan.

provision of contraceptives will have eternal ramifications. And they adamantly believe that participating in the government's proposed accommodation scheme forces them to facilitate the provision of contraceptives. But, unlike tax-code-labeled churches, the religious objectors here must comply with HHS's contraceptive mandate (directly or indirectly) or pay substantial fines. This categorical preference for churches over other, equally sincere believers is plainly absurd and should not be permitted, especially given Congress's decision not to draw such a distinction in RFRA. *See supra* at 9–10.

By deciding to afford a complete exemption to churches, HHS has already implicitly recognized that the proposed accommodation is not sufficient to avoid substantially burdening sincere religious beliefs. And rightly so. The purported accommodation gives religious objectors two choices: Take an action directly contradictory to their sincerely held religious beliefs or pay a hefty fine. That should be enough to find that the religious objectors' beliefs have been substantially burdened in violation of RFRA. *See Hobby Lobby*, 134 S. Ct. at 2777–79. After all, "the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." *Little Sisters of the Poor*, 2015 WL 4232096, at *42 (Baldock, J., dissenting in part). And the penalties the ACA imposes for noncompliance with the contraceptive mandate have already been found substantial. *Hobby Lobby*, 134 S. Ct. at 2775–77.

HHS, and the Tenth Circuit below, however, went beyond asking whether the religious objectors *did* have a sincere belief that the law demanded they violate and additionally asked whether the religious objectors *should* have held that belief in light of the legal mechanics that underlie HHS's accommodation. This inquiry crossed a line that courts and administrative agencies have no business crossing.

As this Court already held, neither HHS nor the courts have the authority to tell a religious objector that his belief about what types of actions are immoral is "flawed" because "the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too attenuated." *Hobby Lobby*, 134 S. Ct. at 2777. Instead, "the question that RFRA presents [is] ... whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2278. Courts have "no business addressing" moral and philosophical questions regarding "whether the religious belief asserted in a RFRA case is reasonable." *Id.* Indeed, even prior to RFRA, this Court held that evaluating the reasonableness of a religious belief was simply not a task courts could or should undertake. *See id.* (citing *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

Even assuming that HHS or the courts could appropriately evaluate the reasonableness of the religious objectors' beliefs, they would have no reason to

second-guess the moral logic of the objectors in this case.

The accommodation scheme leaves religious objectors three choices. *First*, they can directly provide contraceptives—an act that everyone agrees would substantially burden sincerely held religious beliefs if compelled. *Second*, they can refuse to provide healthcare coverage to avoid providing contraceptives and pay substantial monetary fines instead—also an act that all agree would substantially burden sincere religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2776–77. Or *third*, they can participate in HHS's accommodation scheme—the act that HHS claims is not a substantial burden.

This third act, however, is a substantial burden that does not functionally differ from the first. By participating in the accommodation, the religious objector authorizes the government to commandeer its healthcare plan and provide contraceptives through it. And both moral philosophers and society writ large intuitively recognize that providing material aid to those who would perform the ultimately wrongful act constitutes a morally culpable act in and of itself.

Treatises on moral philosophy expressly recognize the potential culpability of those who knowingly engage in innocent conduct that aids another in a wrongful act. As they put it, "[c]ooperation occurs 'when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does.'" *See Hobby Lobby*, 134 S. Ct. at 2778 n.34 (quoting 1 H. Davis, Moral and Pastoral Theology 341 (1935)).

Accepting this premise of moral blameworthiness, the law also recognizes that even minimal involvement in a criminal enterprise can constitute a blameworthy act. For instance, a man that allows his car to be used to transport a gun and a group intent on a committing a drug crime has aided and abetted the offense of carrying or using a gun during a drug crime. *See, e.g.*, *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996); *see also Bazemore v. United States*, 138 F.3d 947, 950 (11th Cir. 1998). And a man that allows his house to be used for a meeting where guns are displayed and discussed and later used in a drug crime has aided and abetted in the same offense. *See, e.g.*, *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *cf. United States v. Daniels*, 370 F.3d 689, 691–92 (7th Cir. 2004); *Wright v. United States*, 182 F.3d 458, 465–66 (6th Cir. 1999). Likewise, under the *Pinkerton* rule, a person can be found guilty for simply conspiring to commit a crime, regardless of the degree of his individual involvement or knowledge of the substantive acts charged. *See Salinas v. United States*, 522 U.S. 52, 63–64 (1997) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

The religious objectors are applying the same logic of moral culpability here. They believe that providing another (their insurer, third-party administrator, or any other plan contractor) with a means (their healthcare plans) to achieve an immoral end (providing contraceptives) is itself an immoral act. Far from being an idiosyncratic view of the degree of involvement necessary to give rise to moral blameworthiness, their view is broadly accepted as a matter of moral philosophy and criminal liability.

3. Because it imposes on the sincere religious beliefs of religious objectors, like petitioners, HHS's accommodation can only be justified if it is the least restrictive means of achieving a compelling interest. By their own actions, however, Congress and HHS have demonstrated that they do not view the interests underlying the ACA's contraceptive mandate as so compelling and unyielding that religious objectors must be forced to comply with it in contravention of their religious beliefs. For that reason, Congress did not exclude the ACA from RFRA's reach. And for that reason, HHS has already exempted churches and their auxiliaries from the mandate. *See* 78 Fed. Reg. at 39873–74. There is no reason HHS cannot do the same for other religious objectors who share identical religious beliefs. And there is certainly no reason that HHS cannot do the same for religious objectors that, like the Little Sisters, provide healthcare coverage through self-insured church plans whose administrators currently cannot be compelled to provide contraceptives anyway. *Little Sisters of the Poor*, 2015 WL 4232096, at *9. Indeed, HHS already has the framework in place to offer just such an exemption: It can extend the existing exemption applicable to churches to all nonprofit religious entities that have "consistently not provided all or the same subset of the contraceptive coverage otherwise required, at any point ... because of the religious beliefs of the organization" just as it did during the temporary enforcement safe harbor period.[6] And where it can do the same for similarly sit-

[6] See Dep't of Health and Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services

uated religious objectors, RFRA demands that it must. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

* * *

RFRA does not allow a government agency to decide what actions a religious adherent should find morally culpable. And RFRA certainly does not allow a government agency to decide that only some religious adherents should be protected from engaging in activity that they sincerely find morally culpable. Yet in designing the bifurcated exemption-accommodation scheme, HHS did both of these things, exceeding the scope of its constitutional and regulatory authority.

Although HHS knew that both churches and other religious entities shared the same religious objections to facilitating access to some or all contraceptives, the agency chose to exempt only part of that group from the mandate. It offered the rest a choice: They could comply with the mandate by authorizing others to use their healthcare plans to distribute contraceptives in their place—in direct contravention of their beliefs—or they could cease providing healthcare coverage altogether and face substantial monetary penalties.

Under the reasoning this Court employed in *Hobby Lobby*, RFRA makes this choice impermissi-

---

Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (reissued bulletin), at 4 (June 28, 2013) *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf.

ble. As our constitutional tradition and Congress have long recognized, no person should be forced to pay a hefty fine to "express [her] beliefs and to establish [her] religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Yet the Tenth Circuit's decision below will have precisely that effect on petitioners and other sincere religious believers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY SHACKELFORD
HIRAM SASSER
JUSTIN BUTTERFIELD
JEREMY DYS
LIBERTY INSTITUTE
2001 W. Plano Pkwy #1600
Plano, TX 75075
(972) 941-4444

BRITTNEY LANE
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071
(213) 430-6000

BRIAN D. BOYLE
(*Counsel of Record*)
bboyle@omm.com
GREGORY F. JACOB
MATTHEW J. SHEEHAN
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

August 24, 2015